IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

FRIDAY, THE 7TH DECEMBER 2007 / 16TH AGRAHAYANA 1929

RSA.No. 746 of 2007()

AS.79/1995 of SUB COURT, OTTAPPALAM
OS.165/1990 of MUNI-MAGI.COURT,PATTAMBI

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: APPELLANTS/APPELLANTS/DEFENDANTS:

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1. KRISHNAN NAIR, AGED 78 YEARS,
S/O. KUNNATHODI PATHAYAPURAYIL CHINNA AMMA.

2. KUNHILAKSHMI AMMA, AGED 66 YEARS,
W/O. KRISHNAN NAIR.
BOTH RESIDING AT NETHIRIMANGALAM AMSOM,
VALLUR DESOM, OTTAPALAM TALUK.

BY ADV. SMT.T.D.RAJALAKSHMI
SRI.R.SREEHARI

RESPONDENT: RESPONDENT/PLAINTIFF:

SAROJINI AMMA, AGED 75 YEARS,
D/O. KIZHAKKEPPATT NANIKUTTY AMMA, REPRESENTED BY
POWER OF ATTORNEY HOLDER, UNNIKRISHNAN NAIR,
AGED 77 YEARS, S/O.KIZHAKKEPPATT AMMU AMMA,
NETHIRIMANGALAM AMSOM,VALLUR DESOM,OTTAPALAM TALUK

BY

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 07/12/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

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R.S.A. NO. 746 OF 2007

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Dated this the 7th day of December, 2007

JUDGMENT

Defendants in O.S.165/1990 on the file of Munsiff-Magistrate Court, Pattambi are the appellants. Plaintiff is the respondent. Respondent instituted the suit seeking a decree for permanent prohibitory injunction contending that plaint schedule property originally belonged to her husband Sankaran Nair and others and O.S.195/1982 was filed by sister of Sankaran Nair for partition and after the death of Sankaran Nair respondent and her children were impleaded as his legal heirs and as per the decree in that suit, share of the sister and brother of Sankaran Nair was separated and the remaining property after taking delivery of the property allotted to them is the plaint schedule property and it is plot NODEPTKL marked in that plan. Appellants property is on the west of the plaint schedule property and the southern

side of property of appellants is bounded by the property of Parameswaran Nair,fourth respondent in O.S.195/1982 and there is a Panchayat road on the northern side of plaint schedule property and appellants have direct access to the road and their western boundaries were occupied by counsin sister of first appellant against whom respondent filed O.S.133/1990 which was also tried along with the present suit. Respondents contended that there is no pathway through the plaint schedule property and appellants and their cousin sister the defendant in O.S.133/1990 attempted to trespass into the plaint schedule property. Respondent filed the present suit as against appellants and O.S.133/1990 against the cousin sister and others. Appellants resisted the suit contending that description of plaint schedule properties are not correct and proceedings in O.S.195/1982 are not binding on appellants as they are not parties to that suit. According to appellants, there exists an ancient path way on the southern side of the property upto

the Panchayat road and said pathway has been put to use by appellants as well as the public openly, uninterruptedly and as of right and existence of pathway was not noted by Commissioner in the plan prepared in O.S.195/1992 and it is immaterial and respondent is not entitled to dispute the right of way and therefore she is not entitled to the decree sought for.

2. Learned Munsiff on the evidence of Pws.1 and 2 and Exts.A1 to A4 and B1 and B2 granted a decree in both the suits as per common judgment dated 11.9.1995. Defendants in O.S.133/1990 did not challenge the judgment. Appellants filed A.S.79/1995 before Sub Court, Ottapalam contending that learned Munsiff did not properly appreciate the evidence. Learned Sub Judge on reappreciation of evidence confirmed the findings of learned Munsiff and dismissed the appeal. It is challenged in the second appeal.

3. Learned counsel appearing for appellants was heard.

4. The argument of learned counsel is that courts below did not properly appreciate the evidence and when Exts.B1 and B2 establish that southern boundary is a way (edavazhi) and Ext.C1 report submitted by Commissioner establish that there wree foot prints on the southern side as claimed by appellants, courts below should have upheld the case of appellants that there exist an ancient pathway through the southern side of property of appellants and it is through the plaint schedule property and therefore the decree granted is not sustainable.

5. On hearing the learned counsel, I do not find any substantial question of law involved in the appeal.

6. Plaint schedule property is the property which originally belonged to Sankaran Nair and his brothers and sisters. It was divided under the decree in O.S.195/1982. Under the final decree evidenced by Ext.A4, Radhakrishnan, the brother of Sankaran Nair, whose share was set apart along with

the share of sister, took delivery of the property and the remaining plot NODEPTKL is the property which was set apart with the share of Sankaran Nair and on his death to the respondent and her children. The right of the respondent to that property cannot be disputed by appellants. They are only contending that there is a pathway which passes through the plaint schedule property and it lies on the south of property of respondent. The argument of learned counsel is that when Ext.B2 shows that southern boundary is a way and Ext.C1 report establish foot prints, courts below should have accepted the case of appellants that there exist an ancient pathway. The question whether there exist an ancient pathway or not, is a question of fact. Learned Munsiff considered this aspect elaborately. First appellant was examined as DW1. Learned Munsiff found that when DW1 was cross examined and a specific question was put on the southern boundary he deposed that perumbrathal kudiyiruppu is shown

as the boundary because of the reason that there is no edavazhi. Learned Munsiff considered the existence of foot prints noted by Commissioner in Ext.C1 report and it was found that plaint schedule property remained uninhibited and there was no encloser on its western side and because of non existence of a fence side for convenience people might have passed through the property and it will not establish that it is an ancient pathway. First appellate court also reappreciated the evidence and confirmed that finding. The appreciation of evidence cannot be said to be perverse. As courts below concurrently found that no ancient pathway exists through plaint schedule proprety as claimed by appellants, I do not find any substantial question of law involved in the appeal.

Appeal is dismissed in limine.

M.SASIDHARAN NAMBIAR
JUDGE

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M.SASIDHARAN NAMBIAR, J.

W.P.(C).NO. /06

JUDGMENT

SEPTEMBER,2006